

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of**

**Jurisdictional Separations and  
Referral to the Federal-State  
Joint Board**

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**CC Docket No. 80-286**

**INITIAL COMMENTS OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”), respectfully submits these comments to respond to the Federal Communications Commission’s (“FCC” or “Commission”) July 18, 2018 *Further Notice of Proposed Rulemaking* (“FNPRM”)<sup>1</sup> seeking comment on, among other things, (i) whether the FCC should extend the current freeze of jurisdictional separations category relationships and cost allocation factors for 15 years or a shorter period, (ii) whether to provide rate-of-return carriers who elected to freeze their category relationships in 2001 a time-limited opportunity to opt-out of that freeze, and (iii) whether to modify the scope of the existing referral.

In response, NARUC respectfully suggests that:

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<sup>1</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board, Further Notice of Proposed Rulemaking*, FCC 18-99, CC Docket No. 80-286, 2018 WL 3495121 (Released July 18, 2018), published at: [83 Federal Register 35582](#) (July 27, 2018).

[1] This *FNPRM* seeks several specific changes to the Part 36 separations procedures. 47 U.S.C. S 410(c) does not permit the FCC to revise those procedures without first consulting with the Separations Joint Board.

[2] It is premature for the Commission to assume that the Joint Board cannot reach a recommended decision that addresses the acknowledged dysfunction<sup>2</sup> of the current separations procedures.

[3] Any extension continuing the current factors will impact ratepayers, companies, particularly smaller rural providers, State programs, and the roll out of broadband services.

[4] As the *FNPRM*'s "category freeze opt-out" proposal demonstrates on its face, practical reforms are both needed and possible. The FCC should not modify the existing referral. Instead, the Commission should extend the current freeze for no more than two years to engage on separations issues, including the proposed limited-time opportunity for certain carriers to "opt-out" of the 2001 freeze. As with past Commissions, that short extension should not be released without consulting with both the federal and State members of the Separations Joint Board to get their recommends on such action.

In support of these positions, NARUC states as follows:

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<sup>2</sup> See, *FNPRM* at ¶ 1, conceding that "the jurisdictional separations rules [are] inadequate to accomplish their intended purpose."

## NARUC'S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,<sup>3</sup> energy, and water utilities. NARUC is recognized by Congress in several statutes<sup>4</sup> and consistently by the Courts,<sup>5</sup> as well as a host of federal agencies,<sup>6</sup> as the proper

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<sup>3</sup> NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competitive local exchange carriers (LECs). These commissions are obligated to ensure that local phone service is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. *See, e.g.*, 47 U.S.C. § 252 (1996).

<sup>4</sup> *See* 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); *see also* 47 U.S.C. §254 (1996); *see also* *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (explaining that "[c]arriers, to get the cards, applied to . . . [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the 'bingo card' system").

<sup>5</sup> *See, e.g., U.S. v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985) (noting that "[t]he District Court permitted [NARUC] to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. *See also, Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *compare, NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

<sup>6</sup> NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, *mimeo* at 31 (June 29, 2010) ("We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.")

entity to represent the collective interests of State utility commissions. In the Telecommunications Act,<sup>7</sup> Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.<sup>8</sup>

NARUC is the organization Congress charged with nominating State Commissioners to the Separations Joint Board.<sup>9</sup> Indeed, NARUC’s counsel has served as a member of the staff for the Separations Joint Board for more than twenty years. NARUC’s members remain concerned about the deficits in the process leading to this *FNPRM*, the tentative proposal that the reform referral be effectively terminated via permanent or a 15 year extension of the freeze without any Joint Board recommendation, and the absence of a proposed referral/ or recommendation with respect to the *FNPRM* question of whether to allow some carriers to freeze their category relationships. Reflecting that concern, at our July meetings in Arizona, the association passed a *Resolution on FCC Release of Notice of Proposed Rulemaking on Separations* requiring the submission of these comments. A copy of that resolution is attached as Appendix A.

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<sup>7</sup> *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub. L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

<sup>8</sup> *See* 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards, which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; *Cf.* 47 U.S.C. § 254 (1996). *Cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “[c]arriers, to get the cards, applied to . . . [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.).

<sup>9</sup> 47 U.S.C. §410(c) (1971).

## DISCUSSION

“Separations” is a process to allocate telecommunications network costs between interstate and intrastate services. As the FNPRM acknowledges at ¶ 6, the “vast majority of the jurisdictional separations rules were last updated more than 30 years ago and reflect the mix of services and the marketplace circumstances of that time.”

Things have changed.

Thirty 30 years ago, the only services riding the telecommunications infrastructure were local and long distance voice services. The separations formula devised at the time was a “75%/25% split,” based on voice services, where 75% of the costs were recovered in intrastate voice rates, and 25% of those same costs were to be recovered in interstate voice rates.

Based on their age alone, the current rules do not properly allocate current costs. But age-related inaccuracies are amplified by advances in technology and several key FCC jurisdictional determinations during the seventeen years since the imposition of the freeze. The current rules simply do not reflect the increased use of intrastate networks for “mixed”<sup>10</sup> traffic the FCC treats as interstate, particularly the bandwidth on shared facilities utilized by Broadband Internet Access Service or

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<sup>10</sup> See, *Qwest Corp. v. Scott*, 380 F.3d 367 at 370 (8th Cir. 2004) (“This clean parceling is not possible, because facilities and equipment used to provide intrastate telecommunications services often are used for interstate telecommunications services as well. Such facilities are “conceivably within the jurisdiction of both state and federal authorities,” *id.*, and are described by the FCC as “jurisdictionally mixed” or “mixed use” facilities.”) Compare, *In the Matter of Protecting & Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 F.C.C. Rcd. 5601, 5803 at ¶ 431 (2015) and, *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, Order, 33 F.C.C. Rcd. 311, 427 ¶ 196 (2018).

internet access service. Whether jurisdictionally severable or not, voice services and broadband access services ride and depend upon the same network infrastructure and use the same technology.<sup>11</sup>

Even though the bulk of network usage is for what the FCC characterizes as interstate services, the current separation factors allocate 75% of the costs to the intrastate jurisdiction, while allowing revenues to flow mainly to the interstate jurisdiction.<sup>12</sup>

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<sup>11</sup> An October 8, 2013 paper by Anna-Marie Kovacs points out that in the United States (i) both voice and internet traffic travel over the same infrastructure, (ii) all voice traffic is migrating to Internet Protocol (IP) based technology and (iii) the transition to IP is “nearly complete.” According to the paper, just the streaming video on these shared IP networks in 2012 “accounted for 120 exabytes of traffic and by 2017 is expect to grow to 359 exabytes, *i.e.*, to roughly 80% of all IP traffic.” That 80% figure does not include non-video non-voice data traffic. *See*, Kovacs, Anna-Marie, *Telecommunications competition: the infrastructure-investment race*, at 2, online at: [https://internetinnovation.org/images/misc\\_content/study-telecommunications-competition-09072013.pdf](https://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf). (Last accessed August 24, 2018). A whitepaper by Cisco, Inc., updated in 2017, notes that globally, IP video traffic will be 82% of all IP traffic (both business and consumer) by 2021, up from 73% in 2016. *See The Zettabyte Era: Trends and Analysis*, online at <https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/vni-hyperconnectivity-wp.html>. (Last accessed August 24, 2018). *Caveat*: the Kovacs paper was commissioned by the Internet Innovation Alliance. It includes some policy prescriptions and statements that, whatever their relative merits, are not driven by the facts cited. The opinions expressed in that paper are solely those of the author.

<sup>12</sup> Broadband costs are included in the regulated cost of service, even when the FCC has determined that broadband services are information services. Seventy-five percent of broadband loop costs are allocated to the state jurisdiction by the gross allocator and the overwhelming majority of broadband costs are loop costs. *See, In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III & ONA Safeguards and Requirements*, Report and Order, 20 F.C.C. Rcd. 14853, 14924–25 at ¶ 130 (2005). (“[A]s specified in section 32.23 of our rules, the provision of this transmission is to be classified as a regulated activity under part 64 . . . because we find that the costs of changing the federal accounting classification of the costs underlying this transmission would outweigh any potential benefits.”)

The misallocation of those network costs are ultimately reflected in the higher rates that the States' consumers and businesses pay for voice services. They skew State and federal universal service programs and provide the basis for arguments that intrastate telecommunications services are "not profitable." They also prevent some providers that serve rural high-cost areas from being able to recover costs needed to provide services.

Yet these obsolete Part 36 rules still apply.

Twenty years ago, in 1997, the FCC already recognized that legislative, technological, and market changes required comprehensive reform of the separations process to reflect the changing real-world use of networks.<sup>13</sup> State commissions and the FCC agreed that the separations process had to be realigned to allocate and recover costs in a way that reflects the actual use of networks for intrastate and interstate telecommunications services.

In 2001, based on a Separations Joint Board Recommended Decision, the Commission froze, on an "interim" basis, the Part 36 jurisdictional separation rules for a five-year period beginning July 1, 2001.<sup>14</sup> The expectation was that five years would provide enough time to complete the review.

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<sup>13</sup> *In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22126, ¶ 9 (1997).

<sup>14</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11393–408, ¶¶ 18–55 (2001).

Instead, in the face of a continuing expansion of federal jurisdiction and an increasing divergence between jurisdictional revenues and jurisdictional costs, the freeze was extended seven times.

The “interim” freeze has now been in effect for 18 years, well over the originally anticipated 5-year span projected for the Joint Board’s analysis and recommendation.

Just last year, in an order confirming the original referral, this FCC acknowledged both the importance of the separations process and the need for reform, by affirming that:

[T]he policy changes the Commission has adopted in recent years, particularly those arising from the Commission's fundamental reform of the high cost universal service support program, the intercarrier compensation systems, and the Part 32 accounting rules, will significantly affect our analysis of interim and comprehensive separations reform, as well as that of the Joint Board.<sup>15</sup>

More recently, in the subject *FNPRM*, the FCC again concedes that separations remains the basis for State and federal calculations of universal service support, for related State regulatory fees, and by some States to set the rates of small local exchange carriers.<sup>16</sup>

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<sup>15</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal State Joint Board*, Report and Order, 32 F.C.C. Rcd. 4219, 4223 (2017).

<sup>16</sup> *FNPRM* at ¶ 11. ([R]ate-of-return carriers now use separations cost results only for...(a) establishing their business data services (special access) rates; (b) calculating interstate common line support for those carriers that have not elected A-CAM support; and (c) calculating subscriber line charge (SLC) levels for the minority of carriers whose SLCs are below the maximum level. The Universal Service Administrative Company (USAC) uses categorization results for calculating high-cost loop support, but without applying jurisdictional allocations. States also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs.”)



These twin acknowledgements of (i) the continuing utility of the separations process for the FCC, the USAC, and States, as well as (ii) the impact of recent reforms the FCC concedes “will significantly affect” the analysis of separations, undermines the *FNPRM* suggestions that comprehensive reform of Part 36 is not warranted.<sup>17</sup>

Indeed, the fact that the FCC is proposing to extend the freeze is, on its face, an acknowledgement that the separations process remains both relevant and useful.

The *FNPRM* also suggests that any reforms to the separations process would be too difficult or take too long to implement.<sup>18</sup> Yet, a few paragraphs later, the *FNPRM* proposes a reform to the process that is easily addressed and clearly within the scope of the current referral. Specifically, the FCC proposes to “provide a one-time opportunity for carriers that opted to freeze their category relationships in 2001 to opt out of that freeze, so that they can categorize their costs based on current circumstances rather than their circumstances in 2000.”<sup>19</sup>

Both a permanent or de facto permanent “15 year” freeze and the proposal to allow carriers to adjust their category relationships are exactly the types of

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<sup>17</sup> *FNPRM* at ¶¶ 10 – 12 (discussing the declining use of the separations process).

<sup>18</sup> *FNPRM* at ¶ 21 (suggesting the issues are extremely complex and implying it is unlikely the Joint Board can issue a recommendation on comprehensive reform in a short extension period.)

<sup>19</sup> *FRNPM* at ¶¶ 23.

Jurisdictional cost-shifting issues<sup>20</sup> Congress specified must be referred to the Separations Joint Board.

The FCC should forward the comments on the “opt-out” and related proposals to the Joint Board as the 47 USC S 410(c) requires and Congress intended. Additionally, as suggested in ¶ 4 of the *FNPRM*, “a shorter extension is preferable.” It is not clear what the Separations Joint Board members would recommend as, unlike in prior freeze extensions, they have not been consulted. NARUC’s resolution recommends a two year extension.

***The Communications Act<sup>21</sup> does not permit the FCC to revise the Part 36 rules without first seeking a recommendation from the Joint Board.***

In February of 2017, to its credit, this Commission acknowledged that if the Part 36 rules “likely would need to be modified,” 47 U.S.C. § 410(c) requires a referral to the Separations Joint Board.<sup>22</sup> The *FNPRM* proposes modifications to the Part 36 rules.

47 U.S.C. § 410(c) is not ambiguous. It states:

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking . . . to a Federal-State Joint Board.

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<sup>20</sup> Indeed, the FCC acknowledges, *FNPRM* at ¶ 27, that “[a]llowing carriers to opt out of the category relationships freeze will necessarily shift costs between jurisdictions and among access elements, and may affect the universal service funding the carrier receives.”

<sup>21</sup> 47 U.S.C. § 410(c) (1979).

<sup>22</sup> *In the Matter of Comprehensive Review of the Part 32 Uniform System of Accounts*, Report and Order, 32 F.C.C. Rcd. 1735, ¶ 46 (2017).

The FNPRM specifically proposes to amend the Part 36 rules to (i) either make permanent or extend the current freeze 15 years, and (ii) to permit carriers to unfreeze category relationships. Those proposals undeniably demonstrate the *FNPRM* is a “proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations.”

Both are also obviously “pursuant to a notice of proposed rulemaking.”

The *FNPRM*, in ¶¶ 17-21, contends that completion of comprehensive separations reform by the December 31, 2018 expiration of the freeze is “highly unlikely” and that letting the freeze expire would “impose significant burdens” on carriers and create instability.

As discussed, *infra*, the ever-present looming deadline of a freeze extension has not been used in the past by the FCC as an excuse to avoid full Joint Board buy-in – formally or informally - on additional limited extensions of the freeze to permit work on reform to continue.

But, whatever the merits or deficits in this rationale for expedited FCC action on a short term extension of the freeze, one thing is clear. There is no exigent circumstance that justifies the agency ignoring the statutory referral requirements in the context of the *FNPRM*’s discrete “unfreeze categories” proposals. The Act requires the FCC to refer those issues to the Joint Board for a Recommended Decision before taking final action in this docket.

With respect to Part 36 freezes, the FCC acknowledged the referral requirement applies by pressing for just such a Recommended Decision<sup>23</sup> as a pre-requisite to ordering the first freeze in 2001.

It also acknowledged in the 2001 decision, that the recommended decisions could not be the basis for future extensions without consultation (i.e., some sort of recommendation) from the Joint Board:

The Joint Board recommended that the freeze automatically expire at the end of five years, *unless extended by the Commission upon the recommendation of the Joint Board*. . . We also conclude that, prior to the expiration of the five-year period, the Commission shall, *in consultation with the Joint Board*, determine whether the freeze period shall be extended.<sup>24</sup>

(Emphasis added)

This is only logical. A recommendation to do nothing for five years while the Board works to adjust the Separations process to correct acknowledged deficiencies is qualitatively different from suggesting a permanent (e.g. 15 year) freeze as the “fix” of those deficiencies - or even a series of freezes that more than triples the originally anticipated freeze proposal.

Prior to the first extension of the freeze in 2006, the State members of the Joint Board agreed to recommend a three year extension in exchange for FCC action.

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<sup>23</sup> *In the Matter of Jurisdictional Separations Reform and Referral to the Federal State Joint Board*, Recommended Decision, 15 F.C.C. Rcd. 13160 (2000).

<sup>24</sup> *In the Matter of Jurisdictional Separations and Referral to a Federal State Joint Board*, Report and Order, 16 F.C.C. Rcd. 11382, 11397 ¶¶ 28-29 (2001).

Ultimately, a Joint Board recommendation for a short freeze was filed in the docket.<sup>25</sup> The letter was signed by the FCC Separations Joint Board Chair Tate, on behalf of all federal members of the board, and State Separations Joint Board Chair Kjellander, on behalf of the State members. The negotiations that led to that letter are evident from its contents.<sup>26</sup> The State members were concerned by the limited FCC engagement.<sup>27</sup> The letter recommended the FCC adopt an interim 3-year extension of the rules, but also recommended the FCC seek additional comment, update the record, and noted the entire Joint Board's intent to meet soon and work to complete comprehensive reform before the expiration of the freeze in 2009.

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<sup>25</sup> *Letter to Marlene Dortch, Secretary, FCC from Deborah Tate, Chair of the Federal State Joint Board, on behalf of all FCC Board members, and Paul Kjellander, on behalf of all State Board members*, CC Docket No. 80-286 (filed April 18, 2006), online at: <https://ecfsapi.fcc.gov/file/6518333902.pdf>.

<sup>26</sup> The back drop for the negotiations that led to this letter was characteristic of the Joint Board process through the early years of the Comprehensive Reform referral. In December 2001, the State Members of the Joint Board filed a fairly comprehensive Glide Path Paper. There was a Joint Board *en banc* a few months later requested by the State members. Next, in 2004, the State members filed a letter with the Federal members of the board seeking a data request to support review activities. In October of 2005, the State members filed an updated Glide path paper as part of the negotiations to extend the freeze and it was included for comment as part of the 2006 extension order. *In the Matter of Jurisdictional Separations and Referral to a Federal State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 F.C.C. Rcd. 5516, 5521 ¶¶ 11-13, Appendix A (2006). Every subsequent extension of the freeze was accompanied by federal assertions that the entire Joint Board would engage on separations issues. Most often, that's not what happened.

<sup>27</sup> This is a recurring theme in State Member comments over the past 17 years. *Compare, Letter from State Members of the Federal State Joint Board on Separations to the Honorable Mignon Clyburn, Chair, Federal State Joint Board on Separations*, CC Docket No. 80-286 (Filed March 5, 2010), at 2, online at: <https://ecfsapi.fcc.gov/file/7020394402.pdf>, noting: "[t]he freeze was originally intended to remain in place from July 1, 2001 to June 30, 2006, but was later extended twice by the Commission for a total of four years. *These extensions were necessary as federal separation reform had not occurred, notwithstanding repeated efforts by the State Members of the Separations Joint Board to engage their federal counterparts in productive discussions.*" (emphasis added).

As part of the negotiations, the FCC agreed to include an updated version of the State Member-authored white paper for comment as part of the 2006 extension.<sup>28</sup>

In the subsequent temporary freezes proposed, *always relatively short, and always premised on the Joint Board completing reform before expiration of the new freeze*,<sup>29</sup> express support for the freeze extension from the State members (a majority) of the Joint Board became the norm.<sup>30</sup>

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<sup>28</sup> *In the Matter of Jurisdictional Separations and Referral to a Federal State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 F.C.C. Rcd. 5516, Appendix A (2006).

<sup>29</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 4219 (2017); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 29 FCC Rcd at 6470 (2014) (Extends the freeze 3 years “while the Joint Board continues its analysis.”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 27 FCC Rcd 5593 (2012) (Extends the freeze two years “while the Joint Board completes its analysis”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd 7133 (2011) (Extends the freeze one year “while the Commission and the Joint Board undertake reform of those rules.”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 25 FCC Rcd 6046 (2010) (Extends the freeze one year while “issues related to interim and comprehensive reform are considered.”); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 24 FCC Rcd 6162 (2009); (Extends freeze 1 year “while the Commission and the Joint Board undertake reform of those rules.”) *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, 5523 (2006). (Extends the freeze 3 years “to allow the Commission and Joint Board to complete comprehensive reform.”)

<sup>30</sup> *See, Letter from State Members of the Separations Joint Board to FCC Commissioners*, CC Docket No. 80-286 (filed April 17, 2009), at: <https://ecfsapi.fcc.gov/file/6520213987.pdf> (Supports the extension); *Letter from State Members of the Separations Joint Board to FCC Commissioners*, CC Docket No. 80-286 (filed March 18, 2011), at: <https://ecfsapi.fcc.gov/file/7021034711.pdf>, noting a majority of the joint board supports “the proposal to extend, by one year, the current freeze regarding separations,” and acknowledging FCC’s prior engagement with the board about the extension “well in advance of the release of this notice.”; *Letter from State Members of the Separations Joint Board to FCC Commissioner Rosenworcel, Separations Joint Board Chair*, CC Docket No. 80-286, (filed March 31, 2014), at: <https://ecfsapi.fcc.gov/file/7521096313.pdf>, noting State members support an extension.

In spite of the facts that the entire Joint Board did submit a recommendation for a three-year freeze and that State members did participate informally in the deliberations that led to the 2006 extension, the agency advanced two unnecessary and untested suggestions.

First, that an “interim extension of the separations freeze does not require a referral to the Joint Board because it is temporary in scope.”<sup>31</sup>

Given the April 2006 Joint Board Letter specifically recommended a three year extension, there was no legal (or logical) basis for anyone to challenge this assertion. It is not clear this untested FCC dicta is consistent with the requirements of section 410(c), but in any case, the rationale certainly is not applicable to either a permanent or 15-year extension – which are hardly “interim” and definitively not “temporary in scope.”

It is one thing to suggest, *as the FCC has with each of the prior extensions*, that a relatively short extension of the freeze is necessary to allow:

the Joint Board additional time to consider changes that may need to be made to the separations process in light of changes in the law, technology, and market structure of the telecommunications industry without creating the undue instability and administrative burdens that would occur were the Commission to eliminate the freeze.<sup>32</sup>

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<sup>31</sup> *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 4219 at ¶ 21 (2017).

<sup>32</sup> *Id.*

It is quite different for the agency to simply ignore agency-acknowledged problems with the existing rules and impose either a permanent freeze or its policy equivalent (a 15-year freeze).

In the same paragraph of the 2006 extension,<sup>33</sup> the FCC also suggested that an “interim extension of the separations freeze does not require a referral to the Joint Board because . . . the issue of extension was within the scope of the Joint Board’s earlier recommended decision.”

This dicta carries the same flaws as the earlier assertion – since there was a recommendation there was no logical or legal way to challenge this dicta.

But even if it were legally sustainable, it would not apply to either a permanent or 15 year freeze as neither can be characterized as “interim.”

Moreover, the rationale is stunningly overbroad. Under this theory, once the Joint Board issues a general recommendation on any separations related topic, the FCC is free for an indefinite period to act in the same general area without further advice. It is particularly inappropriate for application here, where both the federal and State members of the Joint Board in the Recommended Decision, and the FCC in approving that decision, specified an “interim” freeze just until a resolution of the problem could be reached and that the entire Joint Board would be consulted prior to additional extensions. This “argument” makes no sense. It would not matter how many years elapsed in the interim, how many intervening FCC orders were issued,

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*Id.*



nor how the underlying facts had changed. The FNPRM offers no plausible support for such an unlimited interpretation of FCC authority under Section § 410(c).

On the proposed freeze, the FCC should follow past practice and engage the State members to discuss the appropriate length of a freeze under the “deliberative privilege” created in § 410(c),<sup>34</sup> and act only after meaningful consultation with the Joint Board, as anticipated by section and the 2001 freeze order. If the FCC is interested in pursuing a permanent or lengthy freeze, the Act requires a recommended decision.

***It is premature for the Commission to assume that the Joint Board cannot reach some resolution.***

Paragraph 17 of the *FNPRM* suggests both that “the Board is not close to reaching a recommendation,” and that , “the viewpoints” within the Joint Board “are so vastly different on this complex issue that finding commonality is not going to [be] possible in the near term.”

Respectfully, it is premature to reach conclusions that the Joint Board cannot act within a relatively short time frame to offer a recommended decision. Certainly, as referenced earlier, the *FNPRM*’s proposal to permit “one-time category unfreezes” is evidence that near term reforms are possible.

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<sup>34</sup> See, 47 U.S.C. Section 410(c) (1979) (“The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding.”)

Moreover, while consensus is always preferable, it is not required. The relevant question is not whether all seven members of the Board can “find commonality.” The question is whether a majority of the Board members can agree on a recommended approach. In the past such intra-board majorities have driven compromise recommendations that were ultimately released for the full Commission’s consideration.

Logically, at this point, no one can predict if it is impossible reach a compromise, as since the retirement of Commissioner Clyburn from the agency, the Joint Board is currently lacking a full complement of federal members.

***Any extension continuing the current factors will impact ratepayers, effect State programs, and the roll out of broadband services.***

In paragraphs 20 and 21 of the *FNPRM*, the FCC asks if extensions will have an impact on ratepayers and if a relatively long or permanent extension would be inconsistent with 47 U.S.C. Section 201(b)’s prohibition on unjust and unreasonable charges.

The answer to both questions is yes.

The current Separations process affects ratepayers. No one contends that the current factors bear any resemblance to reality. Indeed, the FCC, by proposing the “one-time category unfreeze option,” effectively acknowledges that the current rules both impact rates and the roll-out of broadband in rural areas. The factors are skewed. There is no way to divine the likely impact of the extended freeze on the reasonableness of charges.

The current Separations process necessarily misallocates network costs and revenues - attributing 75% of network costs to states based on the inaccurate presumption that networks are still used primarily for intrastate voice services.

But voice is no longer the dominant use of telecommunications networks so even assuming the current split of voice traffic remains approximately 75% intrastate and 25% interstate, use of those percentages no longer makes sense. Why? Because voice service use of the common network has been dwarfed by internet and other broadband access services the FCC classifies as interstate.<sup>35</sup>

This means, at least with respect to rate-of-return carriers, States bear 75% of the cost of the network facilities, even though the revenues for broadband and other mixed-use services are allocated to interstate services. This apparent cross-subsidization of interstate services hurts consumers and rural America's ability to compete in a global economy.

Rates for intrastate services for those carriers are higher than they would be if there were proper allocations of the interstate network costs to interstate services. Lowering the State rates to reflect a reasonable allocation of costs may provide State commissions with the incentive to enhance their universal service programs to support of deployment broadband facilities and services. Why? Because the consumers' total bill as affected by the action of the State commission (local rate plus State contribution factor) would be reduced.

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<sup>35</sup> See, footnote 11, *supra*, suggesting as the minimum floor for the percentage of non-voice traffic carried over today's shared networks of 80%. That only accounts for video applications. That, of course, means that the percentage of voice traffic carried over this common infrastructure must be some number well under 20%.

Equally important, the misallocation means that the FCC’s estimate of the cost of supporting existing broadband networks is unreasonable. The common line portion of the broadband loop support (BLS) mechanism does not accurately reflect interstate costs due to the retention of broadband cost in the intrastate jurisdiction. This misallocation causes the FCC’s support of such deployment to be significantly understated, and distorts the rate-of-return carriers’ decision to choose between legacy and model support mechanisms.

As the *FNPRM* “one-time category unfreeze option” proposals recognize, the impact of the misallocations is not simply theoretical. It has real world impacts. For example, earlier this year, Terral Telephone Company, Inc. told the FCC<sup>36</sup> that:

[t]he freeze on Terral’s separations category relationships is a major impediment to the deployment of broadband by Terral on Tribal land. Because of the Separations freeze, facility costs that are not related to last-mile loop costs are treated as last-mile loop costs. Allocating such costs to last-mile loop artificially creates unusually high per line costs. With a grant of the waiver, only last-mile loop costs would be assigned to subscriber loop. This would significantly reduce last mile costs, allow Terral to reduce broadband rates, make broadband more affordable, create a market for this service and, thereby, remove a major barrier to Terral’s ability to deploy broadband.”

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<sup>36</sup> See, [Notice of Ex Parte Filing for Terral Telephone Company](#), *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, page 2 (fil. May 2, 2018) regarding its *Petition of Terral Telephone Company, Inc. For Waiver of 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 to Unfreeze Part 36 Category Relationships*, page 2(fil. May 2, 2018)

Since the freeze, “Terral has made substantial investments and deployed fiber facilities, both of which place a disproportionate share of Terral’s investment on the intrastate jurisdiction, based on the frozen categories.”<sup>37</sup>

Terral has repeatedly asked the FCC “to grant its long-pending waiver request in order that proper jurisdictional allocations of investment and expense may be recognized.”<sup>38</sup>

Terral is not unique. Comments filed by The New Network Institute & the Irregulators demonstrate that the “*interim freeze*” perpetuates a pre-Internet view of networks which vastly understates the cost of interstate services at the expense of local voice service.<sup>39</sup>

Terral’s unfortunate circumstances illustrate one problem with the existing freeze - it undermines the FCC’s funding mechanism for rural America. Congress has been vocal about flaws in the Federal universal service program’s calculation of support subsidies for broadband access in rural areas. In May of this year, sixty-three

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<sup>37</sup> See, [Notice of Ex Parte Filing for Terral Telephone Company](#), *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, page 2 (fil. May 2, 2018) regarding its *Petition of Terral Telephone Company, Inc. For Waiver of 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 to Unfreeze Part 36 Category Relationships*, page 2(fil. May 2, 2018).

<sup>38</sup> *Id.* at 2.

<sup>39</sup> See, Comments by New Networks Institute & The Irregulators, *In the Matter(s) of Comprehensive Review of the Part 32 Uniform System of Accounts and Jurisdictional Separations and Referral to the Federal State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, filed on April 30 and May 24, 2017.

U.S. Senators sent a letter to the FCC stating that more needs to be done to address the shortfall in the federal funding for broadband and reminding the FCC that:

In April of 2017, 58 Senators called on the FCC to provide adequate resources for broadband delivery services to rural consumers in the areas that are the hardest and costliest to serve. In May of 2017, 102 Representatives wrote to the FCC, expressing similar concerns about the impacts of insufficient USF resources on rural consumers.<sup>40</sup>

On March 18, 2018, Pioneer Telephone Cooperative (Pioneer), filed an *Ex Parte* of its meeting with FCC staff to express concerns that its “five year old pending Petition” requesting to be allowed to unfreeze its separations factors has received no response:

When it made its election in 2001, Pioneer reasonably relied on the Commission’s statement that the freeze would last no more than five years and reasonably expected that its investments and expenses would remain relatively stable over that period. Since 2006, however, the industry has changed significantly and Pioneer has made substantial investments which the frozen separations factors allocate excessively to the intrastate jurisdiction. In addition, Oklahoma has decided to phase out a portion of its state universal service support program. Both of these factors could have negative impacts on Pioneer and its customers, as a result of lost cost recovery and cross subsidization of services due to inappropriate categorization of investment.<sup>41</sup>

NTCA, which represents more than 800 independent, community-based telecommunications companies, largely rural in nature, recommended that the FCC:

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<sup>40</sup> See, *Letter from 63, U.S. Senators addressed to Chairman Pai of the Federal Communications Commission*, page 1, sent May 15, 2018, referring to a similar letter sent by 58 Senators to the FCC in April 2017, and another sent in May 2017, by 102 Representatives.

<sup>41</sup> See, [Notice of Ex Parte Filing For Pioneer Telephone Cooperative](#), *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, page 2 (fil. March 18, 2018) page 1-2, regarding its Petition of Pioneer Telephone Cooperative, Inc. For Waiver of 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 To Unfreeze Part 36 Category Relationships.

grant rate-of-return carriers with frozen categorization factors a one-time option to “unfreeze” their part 36 category relationships and cost allocations provided that resulting adjustments can be made in tariff rate calculations. For these carriers, the shift toward IP-enabled and interstate/jurisdictionally mixed services are not carrying out separations shifts at the pace of consumer demand; shifts in consumer usage of interstate services are taking place, yet due to frozen categorization factors, interstate cost assignments are not taking place at the pace of consumer demand.<sup>42</sup>

ITTA members representing broadband, wireline and wireless voice, video, and other communications services providers operating in predominantly rural areas across 43 states concurred in this suggestion.<sup>43</sup>

The rural local exchange carriers that froze their categorizations years ago now find themselves mired in outdated cost categorizations that prohibit their ability to recover their costs.

As both the *FNPRM* proposals and these examples illustrate, the existing Separations process is having unanticipated negative effects on the federal universal service program, the deployment of broadband in rural areas, State programs, and ratepayers.

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<sup>42</sup> See, [Reply Comments of NTCA-The Rural Broadband Association](#), *In the Matter(s) of Comprehensive Review of the Part 32 Uniform System of Accounts and Jurisdictional Separations and Referral to the Federal State Joint Board*, WC Docket No. 14-130, CC Docket No. 80-286, at page 4 (fil. June 8, 2017).

<sup>43</sup> See, [Notice of Ex Parte Filing for ITTA](#), *In the Matter of Jurisdictional Separations and Referral to the Federal State Joint Board*, CC Docket No. 80-286, page 1 (fil. June 29, 2017).

Reform is needed, and there are possible solutions that can be addressed within the scope of the outstanding referral.<sup>44</sup>

***Reform is needed. The FCC should not modify the existing Referral***

In paragraph 22, the *FNPRM* also seeks “comment on whether the Commission should change the scope of the issues referred to the Joint Board. As the preceding discussion indicates, comprehensive reform should still be a priority for the FCC and the Joint Board. The FCC should make clear the *FNPRM*’s “one-time category unfreeze option” proposals are within the scope of the current referral by requesting a recommendation on next steps.

In 2010, the State members of the Separations Joint Board provided the FCC with a detailed reform recommendation that is both administratively feasible and reasonably allocates cost between the jurisdictions.<sup>45</sup> It is administratively feasible because it relies on carriers’ billing records. It reasonably allocates cost because it allocates cost based on the relative amount of broadband services provided on each

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<sup>44</sup> The Joint Board could also study enforcement/compliance with existing rules requiring the direct assignment of private line costs annually which exacerbates the mismatch. 47 C.F.R. § 36.3(a) says “Direct assignment of private line service costs between jurisdictions shall be updated annually.” Interstate special access (interstate private line) is among the fastest growing mixed use services. Compare, *In the Matter(s) of Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Universal Service Contribution Methodology, Universal Service Administrator Decision XO Communications Services, Inc.*, Order, 32 F.C.C. Rcd. 2140, 2142 at ¶ 5 (2017) (“In each of the requests for review currently before us, USAC has cited the ten percent rule as its basis for reclassifying as interstate private line revenues that had been reported by the petitioners as intrastate on their FCC Form 499-A filings.”)

<sup>45</sup> [Letter of the State Members of the Federal State Joint Board on Separations to the Honorable Mignon Clyburn](#), *In the Matter of Jurisdictional Separations and Referral to the Federal State Joint Board*, CC Docket No. 80-286 (fil. March 5, 2010).



line. If the line provides only voice service it retains the current gross allocator. As the line provides a mix of voice and broadband service, the percentage allocation to the interstate jurisdiction increases. If the line provides only broadband services, then the entire line is allocated to the interstate jurisdiction in manner similar to the FCC's allocation of broadband only loops.<sup>46</sup> The Joint Board should seek comment on that and other more recent proposals for a recommended decision on reforming the Part 36 rules.

NARUC's July 2018 resolution also suggests the following specific topics, all of which are within the scope of the current referral, where progress may be possible:

1. Whether changes in plant, services, technologies, and jurisdictional changes (such as the treatment of Broadband Internet Access Service and core broadband networks) require separations changes, possibly including modifications to the 75-25 fixed factor and usage factors;
2. Whether separations adjustments (and accounts) are needed to record properly, revenues and costs for wholesale services, including reciprocal compensation and unbundled elements;
3. Whether states that exercise Part 64 authority to exclude carrier plant or expenses for non-regulated services should calculate separations factors;
4. Whether new measurement methodologies can provide useful information regarding how separations reform should occur;
5. How new companies that do not have a pre-freeze usage history should separate their costs during the freeze; and
6. Whether the present method of allocating and distributing funds for Joint Board meetings should be changed to be more effective.

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<sup>46</sup> *In the Matter of Connect America Fund et. al*, WC Docket No. 10-90, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16-33, released March 30, 2016, ¶¶ 189-191.

## **CONCLUSION**

The FCC should extend the current freeze for no more than two years, but only after consulting with all federal and State members of the Separations Joint Board to recommend such action. The agency should appoint the third FCC Separations Joint Board member as soon as possible and engage the State members on comprehensive reform. Moreover, it should also, as per Section 410(c) refer the “unfreeze” proposals to the Separations Joint Board before taking final action on them in this proceeding.

**Respectfully submitted,**

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## *Appendix A*

### *Resolution on FCC Release of Notice of Proposed Rulemaking on Separations*

*Whereas* one of the complexities of telecommunications regulation is that carriers use the same plant to provide jurisdictionally intrastate services, jurisdictionally interstate services, and nonregulated services;

*Whereas* as long as dual jurisdictional regulation remains, some means must exist to virtually divide the company into an intrastate component and an interstate component;

*Whereas* for well over a decade, state commissions and the FCC have agreed that the separations process, used for decades to allocate these network costs between state and federal jurisdictions, must be reformed to allocate and recover those costs in an equitable and reasonable manner, and further agreed that the reforms adopted to recover these network costs must reflect the real-world use of our networks;

*Whereas* in 2001, the FCC's solution to the increased reliance on the nations' networks to provide emerging services was to impose a short-term "interim freeze" of the allocation factors set to expire in 2006;

*Whereas* the solution was ordered *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board, Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, Docket No. 80-286, 16 FCC Rcd 11382 (2001)(Freeze Order), which describes the components of the freeze in detail;

*Whereas* there is a concern that the FCC's perpetuation of an "interim freeze" may be affecting the deployment of broadband in the states by allocating approximately 75 percent of a typical telecommunications' carrier's loop costs and related expenses to the states;

*Whereas* this "interim freeze" of the "75/25 split" was originally designed for voice services and was supported by states based on the FCC's commitment to "comprehensive, permanent reform" of the jurisdictional separations process expected to occur during the five- year period;

*Whereas* the FCC has not addressed the need for comprehensive reform of separations in general and the “75/25 split” in particular;

*Whereas* we are concerned that State members of the Federal State Joint Board proposed solutions to this cost, revenue, and expense misalignment have not been given adequate attention by the FCC;

*Whereas* Commissioner O’Reilly, commenting in part on state proposals on comprehensive reform, stated in his February concurrence to a related successfully concluded Joint Board referral: "I have come to conclude that the viewpoints are so vastly different on this complex issue that finding commonality is not going to be possible in the near term. I have notified the Chairman of such and recommended that the Commission immediately pursue a longer extension of the current freeze than what has been done in the past”;

*Whereas* Commissioner O’Reilly also suggested a 15-year extension of the 17-year old “interim freeze;”

*Whereas* a more transparent approach would be for the FCC to extend the “interim freeze” two more years to permit additional comment on the State members’ recommendations;

*Whereas* commenters in Docket 82-86 continue to agree that the “interim freeze” was never intended to be permanent;

*Whereas* the FCC continues to classify increasing amounts of carrier revenues as interstate, effectively leaving the states stranded with the cost recovery for 75 percent of the network, despite the fact that far more network costs are interstate in nature, and thus, should be recovered through interstate rates;

*Whereas* this cross-subsidization of interstate services arising from the ongoing misallocation of network costs under this “75/25 split” hurts American consumers by suppressing the deployment of broadband, which, in turn, exacerbates the digital divide in rural and urban areas; *and*

*Whereas* this misallocation means that the FCC’s estimate of the scope of the cost of deploying a broadband network and the FCC’s support of such deployment is massively understated; *now, therefore be it*

*Resolved* that the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2018 Summer Policy Summit in Scottsdale, Arizona, states that to make informed decisions, the Joint Board must make every effort to gather facts concerning network and accounting trends within the telecommunications industry; *and be it further*

*Resolved* that even if an extension of the current freeze is necessary, it should not last longer than two years, and any new freeze should be adopted only by administrative rule following a Notice of Proposed Rulemaking, and only after meaningful consultation with the Joint Board, as anticipated by 47 U.S.C. § 410(c) and the Freeze Order; *and be it further*

*Resolved* that the FCC should consider participating in meaningful Joint Board consideration of the following additional issues:

Whether changes in plant, services, technologies, and jurisdictional changes (such as the treatment of Broadband Internet Access Service and core broadband networks) require separations changes, possibly including modifications to the 75-25 fixed factor and usage factors;

Whether separations adjustments (and accounts) are needed to record properly, revenues and costs for wholesale services, including reciprocal compensation and unbundled elements;

Whether states that exercise Part 64 authority to exclude carrier plant or expenses for non-regulated services should calculate separations factors;

Whether new measurement methodologies can provide useful information regarding how separations reform should occur;

How new companies that do not have a pre-freeze usage history should separate their costs during the freeze; and

Whether the present method of allocating and distributing funds for Joint Board meetings should be changed to be more effective.

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*Sponsored by the Committee on Telecommunications.*

*Adopted by the NARUC Board of Directors on July 18, 2018.*